Supreme Court, U.S.
FILED
JUL 29 1993
OFFICE OF THE CLERK

No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

JOHN C. CHRISTIE, JR.
PATRICK J. ROACH
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, DC 20036
Attorneys for Petitioners Chicago Title Insurance Co., Ticor Title Insurance Co. and Security Union Title Insurance Co.

JOHN F. GRAYBEAL
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Raleigh, NC 27602-0389
Attorneys for Petitioner Lawyers Title Insurance Corporation

DAVID M. FOSTER
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Attorneys for Petitioner Stewart Title Guaranty Company

JOEL I. KLEIN *
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
Suite 225
2445 M Street, N.W.
Washington, DC 20037-1435
(202) 775-0184
Attorneys for All Petitioners

FRANK D. TATUM, JR.
PAUL J. LAVERONI
JOHN F. YOUNG
COOLEY GODWARD CASTRO HUDDLESON & TATUM
1 Maritime Plaza, Ste. 2000
San Francisco, CA 94111
Attorneys for Petitioner First American Title Insurance Company

BEST AVAILABLE COPY

* Counsel of Record for All Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. THE PETITION PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION THAT IS WORTHY OF REVIEW BY THIS COURT..	1
II. THE OTHER CLEAR ERRORS MADE IN THE COURT OF APPEALS DECISION WARRANT CORRECTION BY THIS COURT	5
A. State Action Doctrine	5
Arizona	5
Wisconsin	7
B. Filed Tariff Doctrine	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	8
Berning v. Gooding, 820 F.2d 1550 (9th Cir. 1987)	8
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, *amended* 383 U.S. 932 (1966)	8-9
City of Groton v. Connecticut Light & Power Co., 497 F. Supp. 1040 (D. Conn. 1980), *aff'd in part*, 662 F.2d 921 (2d Cir. 1981)	8
City of Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979)	8
FTC v. Ticor Title Ins. Co., 112 S.Ct. 2169 (1992)	6-7
Keogh v. Chicago and N.W. Railway Co., 260 U.S. 156 (1922)	8
Montana v. United States, 440 U.S. 147 (1979)	7
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	2-5
Prentice v. Title Ins. Co. of Minnesota, —— Wis.2d ——, 500 N.W.2d 658 (1993)	9
Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985)	5-7
Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986)	8-9
Ticor Title Ins. Co. v. FTC, 922 F.2d 1122 (3d Cir. 1991)	6
Tucson Unified School Dist. v. Chicago Title Ins. Co., 167 Ariz. 114, 804 P.2d 843 (App. 1991)	6
United States v. Title Ins. Rating Bureau of Arizona, 700 F.2d 1247 (9th Cir. 1983)	7
Statutes and Rules	
15 U.S.C. § 16(a)	7
28 U.S.C. § 1407	2
Rule 23, Federal Rules of Civil Procedure	1, 2, 4
Arizona Revised Statutes §§ 20-341, 20-375, 20-376, 20-378	9
Wisconsin Statutes §§ 625.01, 625.11(1), 625.12, 625.13, 625.15, 625.22	9
Wis. Admin. Code [Ins.] § 3.32(4)(a)	9

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE (1986)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1988

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION

I. THE PETITION PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION THAT IS WORTHY OF REVIEW BY THIS COURT.

The principal question presented is whether a court may refuse to honor a prior federal class action judgment on grounds that absent class members with monetary claims have an unqualified due process right to opt out of a class action, even one properly certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) which deliberately provide for no opt-out right. The Ninth Circuit found such a due process right. Respondents' brief confirms the importance of this Court's review and correction of that ruling, both by what the brief fails to say and by the little it says. Brief in Opposition ("Opp.") 6-10.

Notably, respondents have virtually nothing to say in response to the reasons stated in the petition for granting certiorari. They do not deny that the Ninth Circuit's finding of an opt-out right conflicts with the considered

judgment of the drafters of Rule 23, with Congress's provision for multidistrict litigation (28 U.S.C. § 1407), and with common practice and numerous appellate-court rulings. Nor do respondents dispute that the Ninth Circuit's decision will have dramatically destructive consequences for the fair and efficient conduct of class actions. Nor, finally, do they contest the obvious need for this Court to clarify *Phillips Petroleum Co. v. Shutts ("Shutts")*, 472 U.S. 797 (1985), if that decision is to be extended to the federal-court context. These are reasons enough to grant the petition.

Respondents do briefly attempt to defend the Ninth Circuit's judgment, but their argument is all but a confession that the opt-out ruling is indefensible. Respondents' main defense of the judgment is that "absent plaintiffs must receive proper notice." Opp. 6; *see also id.* at 6-7, 8-9, 9 n.4. The indisputable fact, however, is that the Ninth Circuit's holding has nothing to do with the adequacy of notice: what the court held is that a right to *opt out* is required by due process. Pet. App. 11a-12a. The court of appeals took as a given that notice was adequate, for the simple reason that respondents have never challenged the adequacy of notice in this case.[1] Thus, respondents' primary defense of the Ninth Circuit judgment is a plea to sustain it on an alternative ground—the right to adequate notice. Not only is that plea an improper one, since the ground was not raised below (and is meritless), but by leading their argument with such a plea, respondents effectively acknowledge that the Ninth Circuit was wrong in its opt-out ruling.

[1] In addition to arguing that they were inadequately represented in the multidistrict proceeding—an argument that the Ninth Circuit rejected (Pet. App. 8a-11a)—respondents argued *only* that due process required a right to opt out. *See* Brief of Appellants [Respondents] in Ninth Circuit at 25-29 (arguing for right to opt out; no mention of notice); Reply Brief of Appellants in Ninth Circuit at 2-5 (same); Plaintiffs' [Respondents'] Response in Opposition to Defendants' [Petitioners'] Motion for Summary Judgment at 27-28 (same).

When respondents finally speak to the question of a right to opt out, they simply assert that "*Shutts* itself makes clear that the same constitutional principles apply in a federal forum" as in state court. Opp. 8. But *Shutts* could not possibly make that clear, because the case involved only *state*-court jurisdiction. Not surprisingly, then, the Court in *Shutts* undertook no discussion whatever of the multidistrict litigation statute, the nationwide jurisdiction of federal courts, or any of the other considerations bearing on the merits of any constitutional claim for opt-out rights in federal court.[2]

If *Shutts* is to be relied on to justify such rights, an argument must be made for extending *Shutts*. That respondents instead pretend that *Shutts* already settles the question merely reconfirms that, as the petition shows, any such extension would be wrong. This is particularly true in a federal case like this one, where Congress has authorized a nationwide consolidated proceeding. The Ninth Circuit decision refuses to honor the result of exactly such a proceeding, thereby compelling multiple, repetitive litigation.

Respondents appear to make one attempt to explain why *Shutts* should be extended to apply in federal as well as state court. They state that the due-process ruling of *Shutts* "do[es] not distinguish between absent *resident* class members and absent *non-resident* class members"— thus apparently arguing that *Shutts* involved a procedural-fairness right possessed by *all* unnamed plaintiffs, rather than an issue of personal jurisdiction over out-of-state plaintiffs. Opp. 8-9.[3] But that view is wrong: any read-

[2] *See* 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1757, at 90 (1986) (*Shutts* leaves "unanswered . . . the question whether the same due process restraints exist for federal class actions as those Justice Rehnquist enumerated for plaintiff class members").

[3] It is possible that respondents mean to address only the requirement of notice: the paragraph in which they make this argument twice adverts to the issue of notice. Opp. 8-9. Of course, if they

ing of the whole *Shutts* opinion (as opposed to one sentence in isolation) shows that the case concerned precisely the prerequisites for personal jurisdiction over "out-of-state" plaintiff class members—*i.e.* those without minimum contacts with the State. 472 U.S. at 807. As to those class members, the state court's jurisdiction was found based on consent, which was inferred by the *Shutts* Court from a failure to exercise a right to opt out. *Id.* at 812-813. Equally important, respondents' position confirms that the Ninth Circuit decision will be read, as its unqualified language indicates, to establish that all class-action plaintiffs with monetary claims have a constitutional right to opt out (Pet. App. 12a), regardless whether they have minimum contacts with the forum. That ruling urgently demands review because, as the petition shows, it is wrong, unsupported by *Shutts*, contradicted by numerous circuit-court rulings, and destructive of essential established practice under the express terms of Rule 23(b)(1) and (b)(2).

Respondents end their defense of the Ninth Circuit ruling under *Shutts* by trying (Opp. 9-10) to bring it within this Court's limitation of the *Shutts* decision to cases "wholly or predominately for money judgments." 472 U.S. at 811 n.3. This effort not only fails on its own terms,[4] but is irrelevant to the fundamental error of the

---

are not talking about opt-out rights, the discussion is irrelevant to the Ninth Circuit's ruling.

[4] As noted in the petition at 16 n.10, the quoted limitation of the holding in *Shutts* echoes precisely the traditional Rule 23 limitations on the use of non-opt-out class actions. The Ninth Circuit did not dispute that the MDL 633 class was properly certified under the standards of Rule 23(b)(1) and (b)(2) and did not find that the relief sought or provided in MDL 633 was "wholly or predominately for money damages." Rather, it found that the MDL 633 suit "involved the foreclosure of substantial damage claims." Pet. App. 12a. The Ninth Circuit's ruling thus was based on the existence of asserted monetary claims in MDL 633, rather than any assessment of their significance in relation to the case as a whole, and thus is beyond the scope of the *Shutts* holding as limited by the express language of the Court.

Ninth Circuit warranting review. The Ninth Circuit erred in extending the *Shutts* opt-out holding to the judgment in MDL 633 because a right to opt out was not necessary to establish jurisdiction of the *federal* court over that earlier multidistrict class action. That error is independent of the mix of monetary and non-monetary relief provided by the MDL 633 class action judgment. Respondents simply sidestep the basic issue when they argue about the Ninth Circuit's application of the "wholly or predominately" limitation, which furnishes an *additional* reason why *Shutts* does not apply in this case.

Respondents' brief provides no colorable defense of the Ninth Circuit decision applying *Shutts* to disregard the prior federal class action judgment in MDL 633. The important and fundamental constitutional issues raised by the Ninth Circuit's decision warrant review in this Court.

II. THE OTHER CLEAR ERRORS MADE IN THE COURT OF APPEALS DECISION WARRANT CORRECTION BY THIS COURT.

A. State Action Doctrine.

Arizona. The basis of the Ninth Circuit's refusal to apply the state action doctrine in Arizona was its view that the first prong of that doctrine, the requirement of a clearly articulated state policy, was not satisfied because the Arizona statutes authorizing title insurance rating bureaus did not "displace competition with regulation." Pet. App. 13a. The petition at 23-24 explains that this holding is directly contrary to the ruling of this Court in *Southern Motor Carriers Rate Conference v. United States ("Southern Motor Carriers")*, 471 U.S. 48, 59-60 (1985), that a state policy permitting but not compelling participation in rating bureaus satisfies the state policy prong of state action analysis. The state regulatory policy upheld in *Southern Motor Carriers* manifestly did *not* displace all competition with regulation. *Id.* at 59. The

Arizona statutes squarely satisfy the state policy requirement of *Southern Motor Carriers.*[5]

Respondents make no attempt to address the conflict between the Ninth Circuit decision and this Court's holding in *Southern Motor Carriers.* Instead, respondents simply assert that "[i]f petitioners' position were correct, state legislatures could simply repeal the federal antitrust laws by authorizing antitrust violations (without providing any regulatory substitute)." Opp. 11. That claim is patently wrong: any such outcome is precluded by the *second* prong of state action analysis—the requirement of active supervision. Thus, respondents' sole attempt to defend the Ninth Circuit ruling on the first prong of the state action doctrine is wholly without merit.[6]

This Court's decision last Term in *FTC v. Ticor Title Ins. Co. ("Ticor"),* 112 S.Ct. 2169 (1992), cited at Opp. 11, did not involve application of the first but rather the *second* prong of the state action doctrine, the requirement that the state "actively supervise" its regulatory policy. The Court's reference there to the displacement of competition was in that context—it said that a State "may displace competition with active supervision." 112 S.Ct. at 2176. The Court gave no indication of any change in its traditional two-part state action formula. Indeed the Court restated the first prong of the state

[5] As noted in the petition, Arizona by statute specifically authorizes joint rate filing by title insurance rating bureaus as part of the state's "extensive" program of regulation over title insurance rates. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 167 Ariz. 114, 115, 804 P.2d 843, 844 (App. 1991). Indeed, in the FTC proceeding that was the subject of this Court's decision last term, it was conceded that Arizona's policy permitted filing of joint rates by title insurance rating bureaus and satisfied the first prong of the state action test. *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122, 1135 (3d Cir. 1991).

[6] In the court of appeals, respondents expressly rejected the principle on which the Ninth Circuit relied; they said, "[t]he principle that compulsion of rate-making by the states is necessary for state action immunity was rejected by the Supreme Court in *Southern Motor Carriers.*" Appellants' C.A. Br. at 30 n.6.

action test in terms that embodied the holding of *Southern Motor Carriers*: the State must have "articulated a clear and affirmative policy to *allow* the anticompetitive conduct." *Id.* at 2175 (emphasis added).[7]

Wisconsin. The Ninth Circuit's state action ruling in Wisconsin was based solely on its *sua sponte* fact finding that the extent of state supervision there did not satisfy the second prong of the state action test. Pet. App. 14a. The petition at 24-25 points out that by basing that fact finding on this Court's decision last Term in the *Ticor* case, the Ninth Circuit's decision violates section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), which directs that "collateral estoppel effect shall not be given to any finding" made in an FTC proceeding.

Respondents reply to this clear error by mischaracterizing the record below. Contrary to their assertions (Opp. 12 n.7), no motion was filed in the district court seeking summary judgment on the basis of the state action doctrine. The record before the district court was most emphatically *not* "essentially . . . the same record developed by the FTC." *Id.* On the contrary, there was no factual record at all concerning the nature or extent of state regulatory supervision. Moreover, the Ninth Circuit did not purport to base its ruling on any review of the record developed in the district court, but relied entirely on the result of this Court's review of the FTC proceeding. Pet. App. 14a. To have made its ruling in such a fashion is a

[7] Respondents also incorrectly argue (Opp. 11 n.6) that collateral estoppel provides a potential basis for the Ninth Circuit's holding as to Arizona, based on the eleven-year-old decision in *United States v. Title Ins. Rating Bureau of Arizona*, 700 F.2d 1247, 1253 (9th Cir. 1983). This was not, of course, the basis for the Ninth Circuit's decision here. In any event, the reasoning underlying that earlier decision was vitiated by the intervening ruling of this Court in *Southern Motor Carriers.* Where the controlling legal principles have changed substantially between the previous judgment and the later case, collateral estoppel does not bind a party to a past judgment that is contrary to the correct and controlling rule of law. *Montana v. United States*, 440 U.S. 147, 155 (1979).

violation of federal statutory law that warrants summary reversal.[8]

B. Filed Tariff Doctrine.

The Ninth Circuit refused to apply the filed tariff doctrine of *Keogh v. Chicago and N.W. Railway Co. ("Keogh")*, 260 U.S. 156 (1922), to bar respondents' damages claims, on the sole ground that the title insurance rates "were the product of unlawful activity" and "were not subjected to meaningful review by the state." Pet. App. 15a-16a. The petition at 26-27 points out that this reasoning is contrary to precedent of this Court, including *Keogh* itself and *Square D Co. v. Niagara Frontier Tariff Bureau ("Square D")*, 476 U.S. 409 (1986).

Respondents do not attempt to defend the Ninth Circuit's decision on the basis on which it was rendered, instead arguing that the filed tariff doctrine applies only to federal regulation under the Interstate Commerce Act. Opp. 12-13. This argument has no basis. The filed tariff doctrine has been applied to bar claims for damages based on filed rates in other regulated industries. *E.g. Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (natural gas rates).[9] Moreover, the case principally relied on by respondents, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, *amended* 383 U.S. 932 (1966), did not even involve the filed tariff doctrine.[10]

---

[8] Respondents suggest that the Ninth Circuit could have based its state action ruling as to Wisconsin on the first state action prong. Opp. 12. But the Ninth Circuit itself concluded that the statutory scheme in Wisconsin reflected the legislature's "intent to replace competition with regulation." Pet. App. 11a. Wisconsin's policy thus satisfies even the Ninth Circuit's view of the first state action prong.

[9] *See also, e.g., Berning v. Gooding*, 820 F.2d 1550 (9th Cir. 1987) (agricultural marketing orders); *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Conn. 1980), *aff'd in part*, 662 F.2d 921 (2d Cir. 1981) (electric power rates); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979) (electric power rates).

[10] As this Court noted in *Square D*, "[t]he specific *Keogh* holding . . . was not even implicated" in the *Carnation* decision, which instead stands for the much more general proposition that anticompetitive activities "are not immunized from antitrust scrutiny simply because they occur in a regulated industry." 476 U.S. at 422 n.29 and 421. This Court noted that "a critical distinction remains between an absolute immunity from all antitrust scrutiny and a far more limited nonavailability of the private treble-damages remedy" under the filed tariff doctrine, 476 U.S. at 422 n.28, and refused to be governed by *Carnation* in applying the filed tariff doctrine.

Also ignoring the basis of the Ninth Circuit's ruling, respondents argue that the title insurance regulatory structures in Arizona and Wisconsin are too "passive" to come under the filed rate doctrine. Opp. 13. On the contrary, the regulatory systems of both States require title insurers to file their rates with the state regulators, and grant the regulators authority to order title insurers to discontinue use of rates that do not comport with the regulatory standards established by statute. A.R.S. §§ 20-341, 20-375, 20-376, 20-378; Wis. Stat. §§ 625.01, 625.11(1), 625.12, 625.13, 625.22. Title insurers are expressly prohibited from charging any fee or rate other than those on file with the state insurance departments. A.R.S. § 20-376(H); Wis. Stat. § 625.15, Wis. Admin. Code [Ins.] § 3.32(4)(a). Thus, as with the filed rates at issue in *Square D*, the title insurance rates filed with the Arizona and Wisconsin state insurance regulators were the "duly submitted, lawful rates under the [state statutes] in the same sense that the rates filed in *Keogh* were lawful." 476 U.S. at 419. Indeed, the Wisconsin Supreme Court has recently ruled that the filed tariff doctrine bars the pursuit of state law antitrust damage claims based on precisely the conduct at issue in this case. *Prentice v. Title Ins. Co. of Minnesota*, —— Wis. 2d ——, 500 N.W.2d 658 (1993).

By application of the filed tariff doctrine, even if an antitrust violation could be established, respondents may not recover antitrust damages for having been charged the lawful filed rates. The Ninth Circuit's ruling to the contrary is clear error and should be summarily reversed by this Court.

CONCLUSION

The Court should grant the petition for a writ of certiorari to review the refusal by the court of appeals to grant *res judicata* effect to the class action judgment in MDL 633. The Court should also correct the substantive legal errors made by the court of appeals, either on review if granted or by summary reversal.

Respectfully submitted,

JOHN C. CHRISTIE, JR.
PATRICK J. ROACH
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, DC 20036
Attorneys for Petitioners Chicago Title Insurance Co., Ticor Title Insurance Co. and Security Union Title Insurance Co.

JOHN F. GRAYBEAL
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Raleigh, NC 27602-0389
Attorneys for Petitioner Lawyers Title Insurance Corporation

DAVID M. FOSTER
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Attorneys for Petitioner Stewart Title Guaranty Company

JOEL I. KLEIN *
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
Suite 225
2445 M Street, N.W.
Washington, DC 20037-1435
(202) 775-0184
Attorneys for All Petitioners

FRANK D. TATUM, JR.
PAUL J. LAVERONI
JOHN F. YOUNG
COOLEY GODWARD CASTRO HUDDLESON & TATUM
1 Maritime Plaza, Ste. 2000
San Francisco, CA 94111
Attorneys for Petitioner First American Title Insurance Company

* Counsel of Record for All Petitioners